

THOMAS E. GAYNOR

IBLA 76-334

Decided April 20, 1976

Appeal from decision of the Montana State Office, Bureau of Land Management, rejecting phosphate prospecting permit application M-31081.

Affirmed.

1. Applications and Entries: Vested Rights -- Oil Shale: Withdrawals --
Phosphate Leases and Permits: Permits

An application for a phosphate prospecting permit is properly rejected when the lands applied for have been classified as containing deposits of oil shale. The lands are thereby subjected to the withdrawal from leasing and other disposal imposed by Executive Order 5327. Rejection of the application is required even though the application was filed prior to the oil shale classification and withdrawal.

APPEARANCES: Thomas E. Gaynor, pro se.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Thomas E. Gaynor has appealed from a decision of the Montana State Office, Bureau of Land Management (BLM), dated October 21, 1975, rejecting his phosphate prospecting permit application M-31081, on the basis that the lands applied for had been withdrawn, effective October 1, 1975, as oil shale lands pursuant to Executive Order (E.O.) 5327 (April 15, 1930).

On February 21, 1975, appellant filed with the BLM an application for a phosphate prospecting permit pursuant to 30 U.S.C. § 211(b) (1970), covering 1,840 acres of public lands in Beaverhead County, Montana. On March 5, 1975, the State Office rejected appellant's application on the basis that he had submitted an unsatisfactory application form, and because the applied for lands, with

the exception of an 80-acre tract, had been classified in 1969 as oil shale lands withdrawn from lease or other forms of disposal by E.O. 5327. Appellant resubmitted a proper application form on March 14, 1975, and at the same time appealed the BLM's decision to this Board. The Board affirmed the decision in Thomas E. Gaynor, 21 IBLA 178 (1975), holding that once the Geological Survey (GS) has classified lands as containing deposits of oil shale, those lands are considered to be withdrawn by E.O. 5327, and are no longer subject to phosphate prospecting activity. A discussion of the legal basis for that holding is fully set out in that decision.

In our earlier decision, the Board stated, supra at 179 n. 1, that appellant's application with regard to the 80-acre parcel which had not been classified in 1969 as oil shale lands was still being processed by the BLM and was not included within that appeal. That 80-acre tract is the subject of this appeal.

During the pendency of the original appeal, the BLM informed appellant that prior to issuance of a permit for the 80-acre tract, a report would have to be obtained from GS to determine whether the lands were subject to prospecting or leasing, and thereafter the BLM would be required to do an environmental analysis to determine whether a permit could be issued, and if so, what type of bonding, exploration plan and reclamation stipulations would be required. Thereafter, the BLM was informed by GS, in a memorandum dated October 2, 1975, that GS had classified the subject tract as prospectively valuable for oil shale under the terms of E.O. 5327, effective October 1, 1975, based upon a determination that an outcrop of retort phosphatic shale traversed the tract. 1/ Accordingly, the State Office rejected appellant's application for the same reason as it had the previously rejected land.

In his statement of reasons on appeal, appellant presents a number of objections to the decision below. First he argues that it was improper to reject his application on the basis of a GS classification which was subsequent to the filing of his application. Next he urges that even if rejection by the BLM is upheld by this Board, his application and its priority date should be preserved and suspended pending exhaustion of efforts to appeal to the Secretary and the President. Third, appellant states that the BLM has held his advance rental payment since the time of the

1/ We note that in the original 1969 memorandum from GS to the Montana State Director, BLM, describing which lands had been classified as containing deposits of oil shale, GS stated that its determination was "subject to revision whenever new geologic data indicates that a change is warranted * * *. Hence, future additions or subtractions can be expected."

original filing date of his application and requests return of his money with 10 percent interest. Finally, appellant reiterates arguments raised in his earlier appeal pertaining to economic and public policy bases for permitting phosphate mining activity on lands withdrawn for oil shale purposes.

[1] We find all of these objections to be without merit and accordingly we affirm the decision of the State Office. The filing of a phosphate prospecting permit application creates no vested rights in the applicant, and the permit application must be rejected if the lands described therein are classified as containing deposits of oil shale thereby rendering the lands withdrawn by E.O. 5327; rejection is required even though the application is filed prior to the oil shale classification and withdrawal. Cf. William F. Martin, 24 IBLA 271 (1976); William T. Alexander, 21 IBLA 56 (1975).

As pointed out in our earlier Gaynor decision, after lands have been withdrawn pursuant to E.O. 5327, phosphate prospecting permit applications for such lands must be rejected and cannot be suspended pending appellant's efforts to have the executive order modified by the Secretary or the President to permit phosphate mining on oil shale withdrawn lands. 2/ 43 CFR 2091.1; 43 CFR 3501.1-6; Eugene V. Simons, A-30993 (March 3, 1969) and (Supp.) (August 29, 1969); cf. James Donoghue, 24 IBLA 210 (1976).

Appellant submitted an advance rental payment when he originally filed his permit application. The only reason that the BLM has retained the payment is that appellant has pursued his appeals to this Board in order to determine his rights in the matter. Therefore, his payment has not improperly been held, the Department is not obliged to pay interest to appellant, and his payment will be refunded by the BLM following its receipt of this decision. With respect to appellant's economic and public policy arguments regarding the desirability of allowing phosphate prospecting activity on withdrawn oil shale lands, they do not form an adequate basis for over-turning the BLM's decision. Thomas E. Gaynor, *supra*. Accordingly, since appellant has not disputed the GS classification of the land, it was proper for the State Office to reject his application.

2/ By Executive Order 10355 (May 26, 1952), 17 F.R. 4831 (1952), the President delegated to the Secretary of the Interior the authority, under the Pickett Act of June 25, 1910, 43 U.S.C. § 141 (1970), to temporarily withdraw lands for public purposes, including the authority to modify or revoke withdrawals and reservations previously made.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision below is affirmed.

Martin Ritvo
Administrative Judge

We concur:

Joseph W. Goss
Administrative Judge

Frederick Fishman
Administrative Judge

